JUST CAUSE

The underpinning of discipline

and

DUE PROCESS

JUST CAUSE

In any employer-employee relationship there exist at the most elemental level inherent rights of the ***employer*** and, perhaps, no more than one inherent right of the ***employee***. At the outset the operation of the business is solely within the discretion of the owner. And the fundamental discretion of the worker is either to work or not to work. Even where a society has made collective decisions such as a determination that the society itself will operate certain "businesses" through employment of workers, the fundamental relationship is modeled along the same lines.

Thus, where the employer-employee relationship has developed to a point where there exists a collective bargaining agreement between the employer and a union representing the workers, a drastic change has been made in the relationship. The collective bargaining agreement represents, at its core, specific limitations upon what would otherwise be inherent rights of the employer. In exchange for the only material element the workers bring to the bargain - ***work*** - an employer agrees to certain concessions.

- *Make no mistake about it, a collective bargaining agreement **does not grant** any rights to the employer.*

  It may memorialize a recognition by the parties that certain of the employer's inherent rights continue, in spite of the bargain and in spite of other specific concessions.

  But other than a minor statement to that effect, the agreement delineates at virtually every point rights ceded to the workers.

With this in mind, consider the language of the National Agreement between the United States Postal Service and the American Postal Workers Union, Article 16, Discipline Procedure.

- *Article 16* ***does not grant a right to issue discipline.***

  The Postal Service retains this right - to hire and fire and to discipline - as an *inherent right*, not subject to being granted *by* the workers *to* the employer. What Article 16 does is to specify the limitations upon the Postal Service's right to issue discipline. The primary, most fundamental concession of that right is stated in Section 1:

  . . . No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations.

- The clause, ***"No employee may be disciplined or discharged except for just cause"*** must be understood as a bar to discipline and discharge, a specific and serious restriction of the Postal Service's right.

This represents a recognition by the parties of the worker's right to be secure in his or her job and to be free of unwarranted discipline that otherwise might be meted out at the whim of any supervisor.

DISCIPLINE PROCEDURE

Terms of Article 16 of the National Agreement must be understood as drawing focus specifically on the *restrictive element* of just cause as a *prerequisite* to the exercise of supervisory discretion in the issuance of discipline or discharge.

- In that regard, it is essential to recognize that there are certain elements contained within the concept of just cause that are often referred to as *due process* and there are yet other *due process* elements all of which may effect the outcome of a disciplinary action and its subsequent grievance.

- The distinction should be drawn at the point at which a disciplinary action is issued to the employee.
    - Various factors that pertain to the decisional process leading up to the issuance of the disciplinary action fall under the concept of ***just cause***.
    - Those factors pertaining to events that occur after the supervisor's decision has been made to issue the discipline are not genuinely part of a just cause consideration. And it is appropriate to draw a distinction between ***just cause*** and ***due process***.
- The most fundamental element of just cause must be that it is *prerequisite* to the decision.
    - It is the foundation upon which the supervisor's decisional process is supposed to be based.

For this reason the focus of the steward, in analyzing any discipline for its just cause, must be upon everything that precedes the actual issuance of the action.

- At the same time it should also be recognized that there are provisions of Article 16 that are additional limitations on the Postal Service's right to discipline which do not fall under the heading of just cause.

    For example, the provisions prescribing notice periods, time on-the-clock, and review and concurrence do not relate directly to an analysis of the just cause underpinnings of a disciplinary action.

DUE PROCESS

These other elements are part of what is properly described as ***due process***. Not only is the employee entitled – because of the terms of Article 16 – to be free of disciplinary action that is not for just cause; but also the employee is entitled to receive due process in connection with any disciplinary action issued.

- The employee is entitled to privacy in the recording of job discussions.
- He or she is entitled to receive a written notice of the charges that have been levied against him or her.
- Where a less-than-14-day suspension is the level of discipline, the employee is entitled to remain on the job or on the clock for ten (10) days or until conclusion of a grievance before having to serve the suspension time off.
- Similarly, where the discipline is a suspension greater than 14 days or is a discharge, generally the employee is entitled to a thirty (30) day notice period.
- Any suspension or discharge action requires that the supervisor's decision receive proper review and concurrence of ***higher level*** authority before it is issued.
- Preference eligible veterans' due process rights to appeal to the Merit System Protection Board (MSPB) find articulation in Article 16.
- The employee is entitled to have records of discipline purged from his or her disciplinary files upon conclusion of two years without further discipline.

Article 15 requirements -

- The employee is entitled to have a grievance heard by his or her immediate supervisor at Step 1, and to expect that supervisor has and exercises authority over that grievance including a realistic potential to resolve it.
- The further processing of the grievance also must guarantee compliance with the terms of the grievance-arbitration procedure.

THE DISCIPLINE GRIEVANCE

In many ways, the discipline grievance is the simplest form of grievance. In it we need only rebut the action the Service has initiated.

- The Service has made itself the moving party in the action. It must prove its case. We need only demonstrate the Service's failure to do so.

- What the Service must prove is that it established *just cause* to issue discipline before reaching its decision. The basic yardstick for measuring whether or not the Service has established *just cause* the *"tests of just cause"*. While there have been differing versions of these tests over the years, the **JCIM** has memorialized the parties' mutual agreement on what these are under our contract.

Each discipline grievance is written against the backdrop of the Tests of Just Cause

Is there a Rule?
- What is the rule?
- Was the rule well known;
- Communicated directly to the Grievant; and did it
- Include warning of consequences for violation?

Is the Rule a Reasonable Rule?
- Was the rule actually a managerial order?
- Was it clearly a business instruction that a supervisor could reasonably expect to have obeyed?
- Would there have been a significant danger posed in following the order?

Is the Rule Consistently and Equitably Enforced?
- Are all employees held to the same standard?
- Have other infractions resulted in discipline; or
- Do supervisors routinely ignore violations?

Was a Thorough Investigation Completed?
- Did the supervisor actually ascertain the Grievant disobeyed a rule or order?
- Did the supervisor's investigation establish clear and convincing evidence the Grievant was guilty?
- Was the Grievant guilty of an infraction or did he simply make a mistake?
- What constitutes the supervisor's proof of guilt?
- Was the Grievant confronted for his side of the story prior to the decision to issue discipline?

Was the Severity of the Discipline Reasonably Related to the Infraction Itself and in Line with that Usually Administered, as well as to the Seriousness of the Employee's Past Record?

- Was progressive discipline called for; or
- Was the level of infraction such as to warrant departure from progressive discipline?
- Were there other measures available that would have been more truly corrective?
- Was the Grievant's history given credit to mitigate the penalty?

Was the Disciplinary Action Taken in a Timely Manner?

- Did the supervisor act promptly upon knowing of the possible infraction?
- Did delays in administering discipline destroy any corrective effect?
- Have delays caused the record to become stale?

Before the **JCIM**, the Service had stated these *tests of just cause* and their importance to a supervisor considering disciplinary action in Handbook EL-921, Supervisor's Guide to Handling Grievances. Of course, the Service made its typical disclaimer in the preface to this useful handbook:

> "The material contained in this booklet is intended to serve only as broad guidelines. It is provided to assist you in the handling of grievances and disciplinary actions. The guidelines are not necessarily requirements that must be strictly complied with or blindly followed, and *no employee rights are created when these guidelines are not followed.*"

The Union's position on this point is simple.

- We do not need this handbook to "create" employee rights. Our rights in the discipline procedure flow from Articles 15 and 16 of the National Agreement.
- The **JCIM** has now made the Postal Service disclaimer moot.
- The EL-921, however, stands as a valuable statement by the Postal Service of its long-standing recognition of the standards by which ***just cause*** must be measured.

And it is worth noting the definition of *just cause* given by Arbitrator Carroll R. Daugherty in his often relied upon articulation of what had developed through labor arbitration over many years:

> "Few if any union-management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.
>
> A no answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such no means that the employer's disciplinary

decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The Questions

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

> Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.
>
> Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.
>
> Note 3: A finding of lack of such communication does not in all cases require a no answer to question 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.
>
> Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

> Note: If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover), unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

> Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.
>
> Note 2: The company's investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time, there has usually been too much hardening of positions. In a very real sense, the company is obligated to conduct itself like a trial court.

Note 3: There may, of course, be circumstances under which management must react immediately to the employee's behavior. In such cases, the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b), if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person, there are not witnesses to an incident other than the two immediate participants. In such cases, it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.

Note 2: The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

6. Has the company applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

Note 1: A no answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a

finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgement thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing established firm yes answers to the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "judge," might have imposed a lesser penalty. Actually, the arbitrator may be said, in an important sense, to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not, in itself, warrant a finding of company unreasonableness.

Arbitrator Carroll Daugherty
Enterprise Wire co. 1966

Countless arbitrators since Arbitrator Daugherty have addressed these principles, each in his or her own way. There is little to be served by recounting the wide variety of explanations of how *just cause* applies to discipline. But it remains essential to remember that *just cause* has been applied to discipline in many labor-management relationships even without explicit reference to it in the labor agreement; our contract with the Postal Service is absolutely clear on the essential point –

No employee may be disciplined or discharged except for just cause

It is also *absolutely essential* to understand that, once the parties agreed to articulate a mutual agreement about the tests of just cause in the **JCIM**, we have removed from arbitrators' discretion any question about application or interpretation of these tests.

APPLICATION OF DUE PROCESS

> **Section 8. Review of Discipline**
> In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

Review and concurrence is an essential element of due process. Its absence is viewed by many arbitrators to be a fatal flaw.

- The steward must investigate the discipline *process* to determine whether or not the Service properly applied this essential requirement.

There are several elements to the review and concurrence requirement –

- The supervisor's decision must come first.
- Review and concurrence must be secured prior to issuance of the discipline.
- The reviewing authority must be higher level than the issuing supervisor.
- This authority rests in the installation head.

Some Arbitrators' Views

In case **C1R-4H-D31648**, Lowry City, Missouri, decided January 12, 1985 by Arbitrator Jonathan Dworkin, the arbitrator observed:

> . . . when higher-level authority does more than advise: when it takes over the decision-making role and eliminates the contractual responsibility of local Supervision – and then concurs in its own decision – a substantive due-process violation occurs.
>
> Such a violation cannot be overlooked as a mere technicality. The negotiated bi-level disciplinary procedure provides a unique protection for employees.
> [p.12]
>
> . . . once it was determined that the discipline imposed on Grievant was contractually improper because it lacked substantive due process, the Arbitrator's power to explore the merits ended. Since a suspension would have required the same adherence to Article 16, Section 6 as did the removal, any penalty involving time off without pay would have been unsupportable unless the requisite procedures were followed.
> [p.15]

In case **E1R-2F-D8832**, Fleetwood, Pennsylvania, decided February 10, 1984 by Arbitrator Nicholas H. Zumas, this arbitrator had this to say about due process and review and concurrence:

> . . . Grievant was denied basic procedural "due process" rights explicit in the Agreement between the parties, and this grievance must be sustained. Under the circumstances, there is no reason to consider the merits.
>
> Implicit in the language of Article 16(6) is the requirement that a supervisor (or a postmaster in a small installation) make a recommendation or decision as to the imposition

> of discipline before referring the matter for concurrence to higher authority. . . It follows that the decision to impose discipline or the nature of the discipline may not be initiated, as in this particular case, outside the installation by higher authority. . . Failure to carry out his responsibility under the National Agreement rendered [the supervisor's] issuance of the Notice of Removal a nullity.
> [p.4]

In case **E1T-2D-D15285**, Capitol Heights, Maryland, decided August 15, 1985, by Arbitrator William J. LeWinter, we find the following:

> . . . the National Agreement does not specifically state that suspension or discharge must be issued by the grievant's immediate supervisor. It must be issued by a supervisor and concurred in.
> [p.7]
> . . . The deciding factor is whether the supervisor issuing the discipline makes the decision, or if it is made for him. In the former situation, the discipline is valid. In the latter, it is not.
> [p.8]
> . . . the issuing supervisor must decide on the discipline before securing concurrence. Concurrence is to apply to the supervisor's decision, not the other way around.
> [p.9]
> . . . when the issuing supervisor is put in the position of being the Step 1 grievance officer and has had nothing to do with the decision to remove, he can hardly be assumed to have the authority to settle the matter as required by the National Agreement.
> [p.10]

(Note: The Arbitrator's award in this case was to rescind the removal; however, he awarded no backpay due to Union's failure to raise procedural arguments relative to the lack of proper review and concurrence early in the grievance procedure.)

In case **A94C-4A-D 98108118**, decided April 8, 1999, by Arbitrator Jacquelin F. Drucker, we find these remarks:

> ...The arbitrator therefore finds that the supervisor did not seek review and concurrence from the installation head or his designee and, in fact, may not have even known that it was required, before she issued the notice of removal.
>
> With this finding, the Notice of Removal cannot stand. The requirements of Article 16, Section 8, are clear and unbending. This requirement is the one pre-removal step that acts as a check against the first-line supervisor's authority. It is the step that guards against the imposition of inappropriate discipline by a first-line supervisor who may lack experience with the concept of progressive discipline, may not be familiar with all relevant installation practices and policies, may lack an understanding of complex facts, or may even have inappropriate personal motivation. Transcending all such potential underlying principles, however, is the fact that this step is a clear requirement of the contract. Numerous arbitrators have recognized that the step of review and concurrence is an essential, contractual prerequisite to removal. Without it, the removal violates the very processes to which the parties have agreed in clear, unambiguous, and specific contractual language.
> [p.13]

In case **DR-31-88**, decided March 20, 1989, by Arbitrator Zumas, again we find strong support for the necessity of proper review and concurrence:

> [N]umerous Postal Service arbitrators . . . have concluded that the review/concurrence provisions of Article 16.8 of the National Agreement is an essential and fundamental ingredient of the grievance process between these parties; and that violation of these provisions are of sufficient gravity to warrant reversal of any disciplinary action on the grounds that the just cause standard was not met. (See Cases S4N-3A-D 37169; E1N-2B-D 15278; S4W-3T-D 46556; S8N-3F-D 9885; S8N-3W-D 28820; E1R-2F-D 8832; E1N-2U-D 7392; and E1N-2B-D 15278.)
> [p.12]

(Although we may disagree with Zumas' characterization of the review and concurrence requirement being part of a *just cause* determination – as opposed to being part of *due process* – his view is not inconsistent with the expression of *just cause* by Arbitrator Daugherty. Nor does this fine point diminish the importance of this element in the final determination whether or not the employer's action can be sustained.)

In case **C90C-4C-D 93014414**, decided March 9, 1994, Arbitrator Lawrence R. Loeb offers this thoughtful analysis:

> Having adopted a procedure to protect members of the Bargaining Unit from ill-conceived, rash or capricious action, the Service is required to adhere to that procedure. It can no more ignore the obligations created by Article 16, Section 8, of the Agreement than can it ignore any other provision of the Contract. Further, it has the obligation to prove that the review occurred, just as it has the obligation to prove each and every other aspect of its claim that it had just cause to discipline or discharge an employee. The proof need not be elaborate. It can be nothing more than the signature of the concurring official, coupled with testimony establishing who that person is and where he stands in the chain of command. Such testimony creates a rebuttable presumption that the proposed disciplinary action was reviewed by some individual not directly involved with the original decision who calmly considered all of the factors involved in the case.
> [pp.17, 18]

More important than this history in regional level arbitration is the national interpretive arbitration award rendered in a National Rural Letter Carrier Association grievance.

E95R-4E-D 01027978, Dana Edward Eischen, December 3, 2002 –

Here the arbitrator interpreted the review and concurrence provisions of the NRLCA National Agreement to pose mandatory procedural requirements on the exercise of disciplinary actions, violation of which may be fatal to the discipline. The award is worth studying, but here are the essential rulings of the award:

ISSUE No.1

Article 16.6 Review of Discipline of the Extension to the 1995-1999 USPS-NRLCA National Agreement:

a) Is not violated if the lower level supervisor consults, discusses, communicates with or jointly confers with the higher reviewing authority before deciding to propose discipline;

b) Is violated if there is a "command decision" from higher authority to impose a suspension or discharge;

c) Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge;

d) Is not violated if the higher level authority does not conduct an independent investigation and relies upon the record submitted by the supervisor when reviewing and concurring with the proposed discipline;

e) Is violated if there is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge;

f) Is violated if there is no evidence of written review and concurrence prior to the imposition of a suspension or discharge.

ISSUE No.2

(a) Proven violations of Article 16.6 as set forth in Issues 1(b), I(c)or 1(e) are fatal. Such substantive violation invalidate the disciplinary action and require a remedy of reinstatement with "make-whole" damages.

(b) Whether a violation of Article 16.6 as set forth in Issue 1(f) is fatal, invalidates the disciplinary action and requires a remedy of reinstatement with "make-whole" damages is for the area arbitrator to determine based on the facts and circumstances of the individual case.

N.B.: The NRLCA National Agreement language (see below) includes a clause that concurrence must be in writing – *not so in our National Agreement.* Thus the finding identified as 'Issue 1 (f)' would not apply to our Article 16, Section 8.

> **Section 6. Review of Discipline**
> In no case may a suspension or discharge be imposed upon an employee unless the proposed, disciplinary action has first been reviewed and concurred in by a higher authority. Such concurrence shall be in writing.
> [NRLCA National Agreement, 1995-1999, Article 16]

While the Service may not agree that Arbitrator Eischen's finding necessarily interprets the **APWU** National Agreement, its weight cannot be reasonably denied. And we should cite it where appropriate.

Section 4. Suspensions of 14 Days or Less
In the case of discipline involving suspensions of fourteen (14) days or less, the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges against the employee and shall be further informed that he/she will be suspended after ten (10) calendar days during which ten-day period the employee shall remain on the job or on the clock (in pay status) at the option of the Employer. However, if a timely grievance is initiated, the effective date of the suspension will be delayed until disposition of the grievance, either by settlement or an arbitrator's final and binding decision. The employee shall remain on the job or on the clock (in pay status) at the option of the Employer.

Section 5. Suspensions of More Than 14 Days or Discharge
In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days.

Failure by the Service to provide an employee with the contractually defined *notice period* has been found by some arbitrators to nullify disciplinary action. And, similarly, arbitrators have found critical the requirement that the employee receive proper *written notice of the charges* upon which the discipline is based.

In case **C7C-4M-D 20972**, decided June 14, 1990, Arbitrator Frances Asher Penn stated:

> The arbitrator finds that the language of Article 16, Section 5 speaks for itself unambiguously. Section 5 states that in the case of discharge, '...any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days.' The only exception states is for situations where there is reasonable cause to believe that an employee is guilty of a crime, but this is not a consideration here. Section 5 sets forth a 30 day period before discharge can be effected in all other instances, and the arbitrator must uphold the Agreement as written by the parties. Other arbitrators have also upheld the notice requirement in the Agreement in prior awards including Case Nos. C7C-4M-D 16505 and C1C-4J-D 142.

> The arbitrator concludes that the Postal Service violated the National Agreement by not providing the grievant with 30 days notice as specified in Article 16, Section 5. Because of this violation, the question of whether there was just cause for the discharge will not be considered, regardless of the merits.
> [p.6]

And in case **J90C-1J-D 94048044**, decided April 28, 1995 Arbitrator Mark L. Kahn observed about the requisite notice period:

> The Employer now agrees that grievant should have been returned to pay status when his 14 day Emergency Suspension ended, and has stipulated that it will pay grievant for the period between then and his removal. I agree with the Union, however, that to thus make grievant whole for this period (about eighty days) does not cure the egregious violation. . . Management deprived grievant of thirty days 'on the job or on the clock' upon issuing its Notice of (Proposed) Removal in violation of Article 16, Section 5.
> [pp.12,14]

In case **A98C-1A-D 99184919,/26**, decided April 10, 2000, Arbitrator Arthur J. Flanagan noted the necessity for the notice of charges:

> The minimal perquisites of *'due process'* are notice and a fair hearing before a tribunal empowered to decide the case within a reasonable period of time. In this case it is quite clear beyond any question that the grievant was not provided, within a reasonable period of time, a notice of the charges against him and conceivably the grievant may never been provided a notice of the charges. Accordingly, the Postal Service has failed to fulfill an essential component of the grievant's right to *'due process'* and thereby violated the basic principle of Article 16 of the National Agreement.
> [p.7]

And in case **D90C-4D-D 93015971**, decided September 8, 1994, Arbitrator Susan Berk observed as follows:

> The record in this case establishes that the Grievant was never given written notice of the charges against him and never advised that he will be suspended following a ten (10) day notice period. As such, the Grievant was never afforded the procedural rights as required by the parties' National Agreement. The failure of the Postal Service to afford the Grievant the right to which he was entitled under the terms of the National Agreement is a violation of the Agreement and shall be remedied.
> [p.9]

In the national interpretive decision on emergency placement procedures, **H4N-3U-C 58637** and **H4N-3A-C 59518**, decided August 3, 1990, Arbitrator Richard Mittenthal made this comment about the need for written notice of charges:

> . . . The fact that no "advance written notice" is required does not mean that Management has no notice obligation whatever. The employee suspended pursuant to Section 7 has a right to grieve his suspension. He cannot effectively grieve unless he is formally made aware of the charge against him, the reason why Management has invoked Section 7. He surely

is entitled to such notice within a reasonable period of time following the date of his displacement. To deny him such notice is to deny him his right under the grievance procedure to mount a credible challenge against Management's action. Indeed, Section 7 speaks of the employee remaining on non-duty, non-pay status "until disposition of the case has been had." That "disposition" could hardly be possible without formal notice to the employee so that he has an opportunity to tell Management his side of the story. Fundamental fairness requires no less.
[p.11]

THE GRIEVANCE PROCEDURE

Finally, we must consider the employee's right to receive *due process* in the manner in which his or her grievance appeal is handled.

- Only through faithful application of the grievance-arbitration procedure can an employee receive the hearing of the grievance to which he or she is entitled.

Section 2. Grievance Procedure Steps
Step 1:
(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative.

(b) In any such discussion the supervisor shall have authority to settle the grievance. The steward or other Union representative likewise shall have authority to settle or withdraw the grievance in whole or in part. . .

Step 2:
(a) The standard grievance form appealing to Step 2 shall be filed with the installation head or designee. . .

(c) The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Step 2 appeal unless the parties agree upon a later date. In all grievances appealed from Step 1 or filed at Step 2, the grievant shall be represented in Step 2 for all purposes by a steward or a Union representative who shall have authority to settle or withdraw the grievance as a result of discussions or compromise in this Step. The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. . .

Step 3:
(a) Any appeal from an adverse decision in Step 2 shall be in writing to the appropriate management official at the Grievance/Arbitration Processing Center, with a copy to the Employer's Step 2 representative, and shall specify the reasons for the appeal.
(b) The grievant shall be represented at the Employer's Step 3 Level by a Union's Regional representative, or designee. The Step 3 meeting of the parties' representatives to discuss the grievance shall be held within fifteen (15) days after it has been appealed to Step 3. Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's representative likewise shall have authority to grant the grievance in whole or in part. . .

Section 4. Grievance Procedure - General
A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end. . .

Clearly the parties agreed to a grievance procedure that fully enables the parties to openly negotiate disputes with the benefit of full disclosure and ample opportunity (with substantial guarantees) to reach settlement. In actual practice, the history between the parties has shown substantially less than commendable results. However, the *terms of contract* remain important protections for the *due process* rights of the employees and the Union.

The Service has specific obligations within the grievance procedure. Its failures to live up to those obligations have often resulted in our success at arbitration.

DUE PROCESS for the UNION

We sometimes must deal with the situation in which an individual employee engages directly in the grievance procedure. Often, this has little effect on the employee's or the Union's rights. However, there are occasions when an employee may appear to have altered the terms of the contract as it applies to his or her rights. This sometimes occurs when an employee is given an "opportunity" for a *last chance agreement* in the discipline arena. The following may be instructive on this point:

Arbitrator Carl R. Schedler considered such a situation where, in **Bendix Corp. v. International Association of Machinists, 38 LA 909**, the union sought to pursue a grievance on an issue on which the grievant had accepted a step one denial. In light of the provisions of the National Labor Relations Act, Section 9, the arbitrator discussed the right of an individual to file and adjust a grievance or to otherwise negotiate with the employer without the benefit of the Union. Arbitrator Schedler quoted the Act:

> . . . Provided, That any individual employee . . . shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

In so doing he refers to the two limiting factors of Section 9(a):

> . . . 9(a) requires that two conditions be met for the protection of the Union, neither of which can be found to be clearly complied with. That is, it is at least arguable that the adjustment made with [Grievant] was not consistent with the labor agreement; and it seems that, although there was no indication that the Union was barred from being present when the grievance was discussed, as presumably it was with [Grievant], in fact the Union was unaware of [Grievant's] agreement to settle until after he had signed.

The parties have also addressed this in the **JCIM** –

> ***STEP 1 WITHOUT UNION REPRESENTATION***
> Article 15 distinguishes between two aspects of a Step 1 meeting, the discussion and the adjustment. While both of these aspects may occur at the same meeting, the adjustment may be issued as much as five days following the discussion. A settlement is considered part of the adjustment phase of the procedure.

A grievant has the option to exclude a steward from the discussion portion, where the merits of the grievance are discussed by the grievant and management.

However, absent a waiver by the bargaining representative, Section 9(a) of the National Labor Relations Act requires that the bargaining representative be given the opportunity to be present at the adjustment portion of the grievance procedure.

The bargaining representative need not be given an opportunity to be present if the grievance is denied at Step 1.

And essential to consider are the findings of the United States Supreme Court in *J.I. Case Company v. National Labor Relations Board* (321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762) 14 LRRM 501 (1944). Therein the court addressed the permissible scope of individual contracts and the relationship between them and the collective bargaining agreement:

[INDIVIDUAL CONTRACTS]

After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. ***But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring.*** This hiring may be by writing or be word or mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.

But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat ***as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits***, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates.

* * * * *

Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. "The Board asserts a public right, vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." National Licorice v. National Labor Relations Board, 309 U.S. 350, 364 [6 LRR Man. 674]. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.

[INDIVIDUAL CONTRACT SUPERSEDED]

It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.

[pp 503, 504, ***emphasis added***]

. . . We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice. But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement.

Proper Execution of the Steps of the Procedure

On the importance of an effective Step 1, we reiterate the remarks by Arbitrator William J. LeWinter (quoted herein above) in case **E1T-2D-D15285**, Capitol Heights, Maryland, decided August 15, 1985:

. . . the National Agreement does not specifically state that suspension or discharge must be issued by the grievant's immediate supervisor. It must be issued by a supervisor and concurred in.

[p.7]

. . . when the issuing supervisor is put in the position of being the Step 1 grievance officer and has had nothing to do with the decision to remove, he can hardly be assumed to have the authority to settle the matter as required by the National Agreement.

[p.10]

In another case decided by Arbitrator William J. LeWinter – **S1N-3F-D 39496**, August 13, 1985 – he states:

As to the actual removal, the recommendation came from [the] Acting Sectional Center Director, Customer Services. This clearly was an upper level decision which prevents the effective use of the grievance procedure at the first step and brings the above discussed due process theory into effect. To deny effective use of the grievance procedure by the method of issuance of discipline is to deny due process whereby the discipline must be held to be defective. The above finding makes the questions raised by the merits moot in this case . . .

In coming to this conclusion Arbitrator LeWinter quoted another arbitrator on the importance of Step 1 of the grievance procedure. Arbitrator J. Fred Holly in case **S8N-3F-D 9885** offered this explanation:

In the instant case, the appropriate representatives met at Step 1, but a serious question arises regarding the Supervisor's authority to settle the grievance. . .
These procedural defects cannot be overlooked as being insignificant. They are of serious concern because they are in violation of both the letter and spirit of the National Agreement, and importantly, they deprive the Grievant of his rights to due process. In the absence of due process, the grievance must be sustained without any consideration of its substantive merits.

Although usually very conservative on questions of due process, in case **J94T-1J-D 98010055**, decided July 6, 1999, Arbitrator Elliott H. Goldstein offered the following:

As regards the "order from the top", I have rejected such claims on numerous occasions over the years, when there has not been an effective development of a factual record to justify the Union's argument on that point. See USPS and APWU, USPS Case No. COC-4B-D 10903 (1993)(Joy Ann Holmes, Grievant, Royal Oak, MI), at p. 20. In that precedent case, though, the allegation that there was an "order down" was not coupled with the claim that a supervisor like Halfman stated he had no authority or knowledge of the circumstances when he was selected to handle the Step One grievance. Here, what Halfman wrote at Step I (or said, as set out on the Union's worksheet), seems to me to show that he believed the case before him was out of his hands, and if he acted to review it, it might mean "his butt" would "be in a sling." That assertion is clearly contrary to the provisions of Article 15, especially Section 15.1 (Step 1(b)) of Joint Exhibit 1.

The combination of these two allegations, I note, is thus not the usual bald assertion that Labor Relations controls decision-making in crime situations or occurrences where Section 16.7 has potential application. I hold there has been proven that there were procedural violations, as explained below, and immediately, I so find.
[pp.18,19]

. . . I believe a fair reading of what Halfman said was that an assessment of his authority, in his own mind, was, at least as a practical matter, that he believed he had to "go along to get along." That is inconsistent with the contractual requirement for good faith processing of every grievance so as to hopefully effectuate a settlement at the lowest level possible, I find. In combination, I believe the lack of participation of Halfman in the actual decision and what he said at Step one proves that there may have been an order down in violation of at least the spirit of the contract, but there certainly was a deviation from required due process at the Step One level. I so hold.
[p.20]

In sum, I believe the combination of procedural deficiencies detailed above requires that I sustain this grievance and order the emergency placement in off-duty status of Grievant on or about August 25, 1997 rescinded.
[p.21]

Full Disclosure – Discovery

It is also the principle of *due process* that is operative is controlling arbitral thought on the Union's right to expect full disclosure in the grievance procedure.

New Evidence - New Argument

> *Sound collective bargaining requires frank and candid disclosure at the earliest opportunity of all the facts known to each party. There will undoubtedly be times when factors are not discovered, and therefore not disclosed, until after the grievance has been partially processed, and problem enough is created by those instances. There is not a scintilla of justification for the withholding of information by either party from and after the time it is discovered.*
>
> - Gabriel N. Alexander, General Motors Umpire Decision No. F-97 (1950)

H8N-5L-C 10418, Richard Mittenthal, September 21, 1981 –

In a case involving the enforceability of a Local Memorandum of Understanding, the arbitrator refused to consider an argument raised for the first time at the arbitration hearing:

> "There remains the Postal Service's claim that the local clause in question is "inconsistent or in conflict with" Article XIII which concerns "assignment of ill or injured regular work force employees." The difficulty here is the lateness of this argument. Article XV describes in great detail what is expected of the parties in the grievance procedure. The Postal Service's Step 2 decision must make a "full statement" of its "understanding of . . . the contractual provisions involved." Its Step 3 decision must include "a statement of any additional . . . contentions not previously set forth . . ." Its Step 4 decision must contain "an adequate explanation of the reasons therefor." In this case, the Postal Service made no mention of Article XIII in Steps 2, 3 and 4. Its reliance on this contract provision did not surface until the arbitration hearing itself. Under such circumstances, it would be inappropriate to consider this belated Article XIII claim."
> [pp.9,10, emphasis added]

H8N-5B-C 17682, Benjamin Aaron, April 12, 1983 –

Arbitrator Aaron was asked to address the issue of an attempt to raise "new argument" at the arbitration hearing on a matter of overtime scheduling. Arbitrator Aaron stated, in upholding the NALC challenge:

> ". . .The Postal Service advanced other, more credible arguments at the arbitration hearing to support the reasonableness of its decision to assign the disputed work to Summers, but none of these except the later delivery of mail had been raised during earlier steps of the grievance procedure. I am fully in agreement with Arbitrator Mittenthal that the provisions of Article XV requiring that all of the facts and arguments relied upon by both parties must be fully disclosed before the case is submitted to arbitration should be strictly enforced. . .

> Although there is some question in my mind that all of the overtime work in this case, if pivoted as the Union asserted it should have been done, could have been completed before dark, the Postal Service waived its right to dispute the Union's claim by failing to challenge it directly in the grievance procedure. Accordingly, I shall grant the remedy requested. [pp.9,10, emphasis added]

NC-E-11359, Benjamin Aaron, January 25, 1984 –

In this case the arbitrator dealt with a challenge by the National Association of Letter Carriers (NALC) that certain of the Service's arguments and evidence should be barred as new:

> It is now well settled that parties to an arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at preceding steps of the grievance procedure, and that this principle must be strictly observed. The reason for the rule is obvious: neither party should have to deal with evidence or argument presented for the first time in an arbitration hearing, which it has not previously considered and for which it has had no time to prepare rebuttal evidence and argument. The spirit of the rule, however, should not be diminished by excessively technical construction. The evidence establishes to my satisfaction that [the employees] were well aware from the outset of the reason . . . contrary to the terms of the MOU. NALC is therefore in no position to claim surprise by the testimony and argument offered by the Postal Service during the arbitration hearing.
> [pp.3,4, emphasis added]

C7C-4C 77002, Harvey A. Nathan, June 12, 1989 –

Here the arbitrator addressed the obligation on the Service to fully (and accurately) account for its reasons for denying transfer and the consequences upon the Service for its failure to do so:

> . . . At Step 2 management took the position that the reason was the unavailability of jobs. . . [The Step 2 designee] insisted that no jobs were available. . .
>
> In arbitration, the Postal Service argues that the Union knew all along the [the Grievant's] record was the real reason. . .
> [p.14]
>
> It is basic that an employer cannot ascribe certain causes to actions it takes only to come up with new or different bases when its decision is challenged. . .
> [p.15]
>
> It is likewise beyond question that neither party can assert new or different reasons in arbitration for the action in question. The purpose of the grievance procedure is to resolve questions of possible contract violation, and at the lowest possible level. In order to do so, candor and fair dealing are essential. Both parties must fully develop their positions and share their information with the other side. Article 15 of the National Agreement clearly confirms this axiom. . . If one party comes to arbitration and relies upon facts not fully disclosed at Step 2, that party has not complied with Article 15. Beyond this raw statement of contract violation, there are practical reasons why the absence of full disclosure as required by Article 15 can sink a case. . . . [The] process simply collapses if one side can withhold vital facts or raise newly discovered facts which alter its essential position after the

grievance has been processed, left unresolved and sent to arbitration. Additionally, the absence of full disclosure prejudices the other side. In the time elapsing prior to final resolution other opportunities might be missed.
[pp.16,17]

J90C-1J-C 94013796, Linda DiLeone Klein, January 29, 1998 –

In this case, the arbitrator was presented with an explanation by the Service that differed from what it had presented the Union in response to the earlier steps of the grievance:

> While it can be said that Management's arguments were capably and fully explained at the hearing and in the post-hearing brief, there is nevertheless merit to the Union's contention that the "explanation was too late". . .
>
> The failure of Management to disclose its position during the processing of the grievance deprived the Union of the opportunity to consider the reasons for the denial, to address Management's arguments and to reevaluate the grievance on its merits. To present new evidence/argument at the hearing has been described by various Arbitrators as "arbitration by ambush", and this is what occurred here. Based up this violation of Article 15.2, the Union's position must be sustained. . .
>
> . . . [The Service's] explanations, however valid, were not disclosed prior to arbitration and cannot now be considered as the basis for denying the grievance.
> [pp.6,7]

J90T-4J-C 94041806, Edwin H. Benn, July 27, 1996 –

This case involved a dispute as to what constituted the valid staffing package for a small office. The Service called one witness to testify but failed to produce others:

> First, the only witness testifying for the Service was former Carmel Supervisor Customer Service Hosfield. But, Hosfield had little, if anything, to do with preparation of the staffing package in dispute in this case. Hosfield specifically testified that he was not really familiar with the staffing package at issue in this case. None of the individuals involved in approval or review of the package (MSC Director Field Operations Morrison, Field Division Central Manager Nienaber and Manager Maintenance Engineering Support Bishop) testified in this case. Nor did Postmaster Miller testify about why the version he chose was the correct one. Further, Manager Field Maintenance Operations Chastine did not refute the testimony offered by Maintenance Craft Director Weddell about how Weddell received what appeared to be an approved and authorized package from Chastine. These Individuals (Morrison, Nienaber, Bishop, Miller and Chastine) are Management officials under control of Management who are crucial to the resolution of this factual dispute. The failure of those individuals to testify leads to the inference that had these Management officials been called to testify, their testimony would not have supported the Service's position in this case.
> [And in footnote:] See e.g., *United Parcel Service Inc.*, 67 LA 861, 866 (Lubow, 1976) ("The union's failure to produce Sonny Harvey therefore supports the company's version of the facts."); *S.H. Grossinger, Inc.*, 58 LA 741, 751 (Kaplan, 1972) (". . . the failure of the Employer to call the witness as favorable as Manos must be interpreted most strongly against the Employer.").
>
> See also, *Morrell & Co.*, 74 LA 756, 761-762 (Stokes, 1980) [quoting *Wigmore On Evidence*, S285 (3rd ed.)]:
>
> > "The failure to bring before the tribunal some circumstances, document, or witness, when either party himself or his opponent claims that

the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party . . .

The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to a party's cause."

SPECIAL CONSIDERATION OF JUST CAUSE IN THE CASE OF AN EMERGENCY PLACEMENT ACTION

Arbitrator Richard Mittenthal in H4N-3U-C 58637 and H4N-3A-C 59518, August 3, 1990, addressed a dispute between the parties as to the correct implementation of the Emergency Placement procedure of Article 16, Section 7. The Service had contended that the procedure was *not disciplinary in nature*. The Unions argued that it was, but further that all the usual requirements applicable to disciplinary suspensions were applicable also to this procedure. In the course of his discussion of this dispute, Mittenthal established clearly unique factors involved in the emergency placement procedure and defined the proper application of the principle of ***just cause***.
The following quotation starts at page six of the award:

DISCUSSION AND FINDINGS

Three distinct issues are raised by these grievances. The first concerns the nature of Management's action under Article 16.7, namely, whether placement of an employee on non-duty, non-pay status through this "emergency procedure" constitutes discipline. The second concerns the level of proof necessary to validate Management's action in invoking 16.7, namely, whether it must show "just cause" or whether a mere showing of "reasonable cause" (or "reasonable belief") will suffice. The third concerns the existence of a notice requirement, namely, whether an employee can properly be placed on non-duty, non-pay status under 16.7 without first being provided with written notice of the charge made against him.

I - Nature of Management's Action

The Unions assert that an employee placed on non-duty, non-pay status pursuant to Article 16.7 has been disciplined. The Postal Service insists that this action is essentially investigatory or administrative in nature and cannot properly be viewed as discipline.

Article 16 establishes a comprehensive discipline system for postal employees. Section 1 identifies some basic disciplinary principles, for instance, that discipline should be "corrective" rather than "punitive" and that discipline can be imposed only for "just cause." Section 2 states that when an employee commits a "minor offense", supervision may "discuss" the matter with him but that such "discussion" shall not be considered discipline. Sections 3, 4 and 5 are the typical levels of discipline from a letter of warning (16.3) to a suspension of 14 days or less (16.4) to a suspension of more than 14 days or discharge (16.5). Section 6 contemplates an indefinite suspension in a crime situation and is plainly a permissible variation in the range of available discipline. Section 7, the subject of this

dispute, is an "emergency procedure" which allows Management to place an employee "immediately" on non-duty, non-pay status in certain specified situations. Sections 8, 9 and 10 refer to a necessary internal managerial "review of discipline", a "veteran's preference" in the choice of a forum for contesting discipline, and a statute of limitations as to "employee discipline records."

Given this structure, the strong presumption must be that all of Article 16 relates to discipline. When the parties intended some procedure to be outside the scope of Article 16, to be beyond the disciplinary principles of Article 16, they said so. Thus, Section 2 expressly provides that supervisory "discussions" of the "minor offenses" of employees "are not considered discipline..." No such disclaimer is found in Section 7. Nowhere did the parties state that placement of an employee on non-duty, non-pay status pursuant to Section 7 "is not considered discipline..." Had that been their wish, it would have been a simple matter to write those words into the "emergency procedure."

The employee misconduct which may trigger Management's use of Section 7 is "intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules or regulations." The very same acts of misconduct are cited in Section 1 as constituting "just cause" for discipline. It is difficult to understand the Postal Service view that a suspension for such misconduct is discipline when Management invokes Section 4 or 5 but is not discipline when Management invokes Section 7. The impact on the employee is much the same in all three situations. The employee is taken off of the job against his will and placed on non-duty, non-pay status because of such misconduct. He is denied work and wages. He is punished, that is, suspended, because Management believes he is intoxicated or has stolen something or has ignored safety rules. Indeed, the suspension under Section 7 is more burdensome for the employee because its length is indeterminate and because he may not have been given written notice of the charge against him, conditions which can only serve to heighten his sense of concern.

The Postal Service sees Section 7, the "emergency procedure", as an independent provision unrelated to the typical suspension arrangements found in Sections 4 and 5. However, when one reviews the history of this provision and the overall structure of Article 16, it seems to me that Section 7 should more appropriately be construed as a broad exception to Sections 4 and 5. The "emergency procedure" is, as those words indicate, a recognition that situations do arise where supervision must act "immediately" in suspending an employee because of immediate risks or dangers which do not allow the more time-consuming procedures of Sections 4 and 5. Thus, Section 7 is a permissible variation from the conventional suspensions contemplated by the parties. But it is a suspension nonetheless, one which must be considered an integral part of the Article 16 "discipline procedure."

My conclusion, accordingly, is that a Section 7 suspension should in appropriate circumstances be regarded as discipline. I emphasize "appropriate circumstances" because of one other significant factor. Not all of the Section 7 situations which prompt Management's use of the "emergency procedure" involve employee misconduct. Management can invoke Section 7 when the employee's retention on the job (1) "may result in damage to property or loss of mail or funds" or (2) "may be injurious to self or others." These situations may or may not involve employee misconduct. Suppose, for example, an employee drives a postal vehicle on a delivery route and suffers from a physical ailment which is ordinarily kept under control through medication. Suppose further that, notwithstanding the medication, he suddenly loses control and can no longer drive the vehicle safely although he is unaware of this reality. No doubt Management would invoke Section 7 because the employee "may be injurious to self or others." But because there is no real misconduct, he is not subject to discipline. He is placed on non-duty, non-pay status in the interest of safety. The "emergency procedure", in other words, is broad enough to encompass displacement from the job for non-disciplinary reasons.

These observations suggest the answer to the first issue. When Management places an employee on non-duty, non-pay status because of misconduct covered by Section 7, the employee has been disciplined. That would be true of both grievants in this case, Burch and Ferrell. But when Management places an employee on such status for reasons stated in Section 7 which do not involve misconduct, the employee should not be regarded as having been disciplined. With this distinction in mind, I turn to the next issue.

II - Level of Proof Necessary

The Unions assert that any Management action taken pursuant to the Section 7 "emergency procedure" must be supported by "just cause." The Postal Service insists that "reasonable cause" (or "reasonable belief") is all that need be shown.

My response to this disagreement depends, in large part, upon how the Section 7 "emergency" action is characterized. If that action is discipline for alleged misconduct, then Management is subject to a "just cause" test. To quote from Section 1, "No employee may be disciplined...except for just cause." If, on the other hand, that action is not prompted by misconduct and hence is not discipline, the "just cause" standard is not applicable. Management then need only show "reasonable cause" (or "reasonable belief"), a test which is easier to satisfy.

One important caveat should be noted. "Just cause" is not an absolute concept. Its impact, from the standpoint of the degree of proof required in a given case, can be somewhat elastic. For instance, arbitrators ordinarily use a "preponderance of the evidence" rule or some similar standard in deciding fact questions in a discipline dispute. Sometimes, however, a higher degree of proof is required where the alleged misconduct includes an element of moral turpitude or criminal intent. The point is that "just cause" can be calibrated differently on the basis of the nature of the alleged misconduct.

By the same token, "just cause" may depend to some extent upon the nature of the particular disciplinary right being exercised. Section 7 grants Management a right to place an employee "immediately" on non-duty, non-pay status because of an "allegation" of certain misconduct (or because his retention "may" have certain harmful consequences). "Just cause" takes on a different cast in these circumstances. The level of proof required to justify this kind of "immediate..." action may be something less than would be required had Management suspended the employee under Section 4 or 5 where ten or thirty days' advance written notice of the suspension is given. To rule otherwise, to rule that the same level of proof is necessary in all suspension situations, would as a practical matter diminish Management's right to take "immediate..." action.

No generalization by the arbitrator can provide a final resolution to this kind of problem. It should be apparent that the facts of a given case are a good deal more important than any generalization in determining whether "just cause" for discipline has been established.

BURDEN OF PROOF

It is also worth noting that Mittenthal's view of the *elasticity* of the burden of proof and just cause in regard to the Emergency Placement procedure is shared by many arbitrators with regard to discipline in general. Chiefly this amounts to a tendency to require higher standards of proof for a discharge case than might be demanded for lesser disciplinary action. For example:

> It is a well-established arbitral principle that discharge is tantamount to industrial capital punishment and "is such serious punitive and final action that the employer must carry a heavy burden in supporting such action." (*Ref.:* General Telephone Co. Of Southwest, 79 LA 102, 105 (Holman, 1982), citing Schnuck Markets, 73 LA 829, 832 (1979). It should be noted that true industrial capital punishment is "blacklisting," wherein employers have a generally known and accepted understanding that certain employees shall not be hired.)
>
> There is an active debate being waged over the appropriate standard [of proof] in arbitration and whether that standard should change according to the alleged infraction,

> especially if the allegation might lead to criminal prosecution. . . See, also, Marvin Hill, Jr., and Anthony V. Sinicropi, *Evidence in Arbitration*, 2d ed. . .
> [Cynthia Horvath Garbutt and Lamont E. Stallworth, Theft in the Workplace: An Arbitrator's Perspective on Employee Discipline, The Arbitration Journal, September 1989, Vol. 44, No.3]

But as a general principle, for purposes of addressing just cause in the context of a grievance appeal, the steward's primary thrust must be toward discrediting the employer's case. Regardless what standard of proof an arbitrator may ultimately apply, the steward must attempt to show through the evidence that the employer has failed to prove its case against the employee. And, if the steward assumes that the employer will be held to the lowest standard - *a preponderance of the evidence* - then the steward's evidence and arguments that lead to a conclusion against the employer will be stronger yet as the threshold burden of proof may rise. Conversely, if the steward only attempts to show that the employer did not meet a standard of proof *beyond a reasonable doubt*, the case may fail to show that the employer failed to meet a lesser standard.

[The following discussion has been excerpted from the text, **Evidence in Arbitration**, *Second Edition, Marvin F. Hill, Jr. and Anthony V. Sinicropi.* It represents some of the arbitral thought on the issue of how much proof is necessary for an employer to carry its burden in arbitration of a discharge case where the charge is of a serious nature. It may be concluded that discharge for less serious charges requires lower *quantum of proof* than would be necessary where criminal activity or offenses evincing "moral turpitude" are involved.]

Quantum of Proof

In cases involving moral turpitude, or where the charges are of a criminal nature, there appears to be a division of opinion among arbitrators as to the quantum or degree of proof required. Support for the beyond a reasonable doubt standard is advanced by Arbitrator Howard Block:

> On the quantum of proof necessary to sustain an accusation of theft, arbitrators are virtually unanimous that the proof offered must be beyond a reasonable doubt. Arbitrator Harold M. Somers has written the most oft-quoted explanation for the imposition of such a stringent standard of proof.
>
> > . . . discharge for stealing involves an unfavorable reflection on the *moral* character of the employee which is almost impossible to erase and which will seriously hamper if not altogether prevent his getting a job elsewhere in his line of work and will even hurt innocent members of his

> family. He and they are branded for life. The Company therefore has a heavy obligation in such a case. It carries the burden of proving beyond a reasonable doubt - in its own conscience as well as before the arbitrator - that the employee committed the offense of stealing.
> [Dockside Mach. & Boilerworks, 55 LA 1221, 1226 (1970)]

Arbitrator Burton Turkus has likewise stated the applicable principle as follows:

> The proof upon which the discharge is predicated, when grievous misconduct involving moral turpitude . . . is the basis, should establish guilt thereof beyond a reasonable doubt.
> In other types of overt misconduct such as (a) illegal strikes . . . (b) refusal to perform job assignments . . . (c) fighting . . . and (d) other offenses likewise constituting a breach of peace inside the plant or other challenge to the authority of management and its right to maintain morale, discipline, and efficiency in the work force, the requisite quantum of proof may not fall short of a clear and convincing demonstration of the commission of the offense or offenses upon which the discharge is grounded.
> [Great Atl. & Pac. Tea Co., 63-1 ARB ¶8027 at 3089 (1962)]

Arbitrator Gerald McKay, in *Holiday Markets, Inc.,* discussed the policy reasons for using a high standard of proof in a theft case:

> The Employer could not call the grievant a thief, which is a criminal offense, and have the grievant convicted in a criminal court without meeting the beyond a reasonable doubt burden. Why should the Employer be allowed to have a criminal charge stick in a discharge proceeding causing the grievant all kinds of difficulty in finding future employment, unless it can meet the burden of the criminal charge that it hurls at the employee.
> [Holiday Markets, Inc. 77 LA 648, 655 (1981)]

Other arbitrators, however, have concluded that a standard of proof less than that required by the criminal law is acceptable in arbitration cases. . .

Arbitrator Russell Smith, in the much quoted *Kroger Co.* decision, enunciates a "clear and convincing" standard even where the misconduct is punishable by criminal law:

> In general, arbitrators probably have used the "preponderance of the evidence" rule or some similar standard in deciding fact issues before them, including issues presented by ordinary discipline and discharge cases. However. . . it has been held that where the alleged "cause" for disciplinary action or discharge is misconduct of a kind recognized and punished by the criminal law, the employer must meet a higher standard of proof . . . [I]t seems reasonable and proper to hold that alleged misconduct of a kind which carries the stigma of general social disapproval as well as disapproval under accepted canons of plant discipline should be clearly and convincingly established by the evidence.
> [Kroger Co., 25 LA 906, 908 (1955)]

Arbitrator C. William Stratton, in *Day & Zimmerman, Inc.,* rejected a criminal standard of proof citing the following rationale:

I believe that proof "beyond a reasonable doubt" in a criminal case is actually in layman's terms more akin to clear and convincing proof. . . There is another standard of proof which is used in civil cases which is known as "proof by a preponderance of the evidence.". . . Proof by a preponderance of the evidence is not sufficient in the arbitration case where an employee has been charged with an act which would ordinarily be considered a crime. However, it is this arbitrator's opinion that proof by clear and convincing evidence is sufficient to insure that the employee has been given the benefit of any favorable testimony on his behalf or lack of sufficiency in the employer's case.
[Day & Zimmerman, Inc., 63 LA 1289, 1292 (1974)]